

STATE OF ALASKA

**DEPT. OF ENVIRONMENTAL CONSERVATION
DIVISION OF WATER
DIRECTOR'S OFFICE**

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January 25, 2011

The Honorable Gary Stevens
President of the Senate
Alaska State Legislature
State Capitol, Room 111
Juneau, Alaska 99801

The Honorable Mike Chenault
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, Alaska 99801

Dear President Stevens and Speaker Chenault:

This letter serves as the Department of Environmental Conservation's (DEC) sixth annual report to the legislature on efforts to obtain and implement state primacy for the National Pollutant Discharge Elimination System (NPDES) wastewater discharge permit program. This report highlights our first two years' of effort since the Environmental Protection Agency (EPA) approved the state's program on October 31, 2008—the Alaska Pollutant Discharge Elimination System (APDES) program. This report provides background information; a description of the program responsibilities transferred to the Department; permitting, compliance, and enforcement activities during the previous year; and an update on the notice of a petition filed with the U.S. Ninth Circuit Court challenging EPA's approval of the program.

Background

The 24th Alaska Legislature passed Senate Bill 110 during its 1st regular session in 2005 directing DEC to seek primacy from the EPA for the NPDES wastewater discharge program. Governor Murkowski signed this legislation into law on August 27, 2005 with an effective date of November 25, 2005. Section 6 of the bill reads as follows:

REPORT TO THE LEGISLATURE. Until full authority for administering the National Pollutant Discharge Elimination System has been transferred to the Department of Environmental Conservation, the Department of Environmental Conservation shall submit, within 10 days after the date the Legislature convenes in regular session, a report to both houses of the Legislature and the governor that includes the following information:

(1) the department's progress in preparing and submitting its application to the United States Environmental Protection Agency by June 30, 2006;

(2) a description of the progress by the United States Environmental Protection Agency in reviewing the state's application and the expected or actual date and contents of the agency's approval; and

(3) the progress made by the Department of Environmental Conservation and the United States Environmental Protection Agency during the five-year National Pollutant Discharge Elimination System program transition period, the identification of the program responsibilities that have been transferred to the Department of Environmental Conservation and the program responsibilities retained by the United States Environmental Protection Agency, whether the transition is proceeding on schedule, and identification of relevant statutory, regulatory, or financial impediments to obtaining National Pollutant Discharge Elimination System primacy as intended by the Legislature.

Work Group Involvement

As required by Section 5 of SB 110, DEC will continue to confer as needed with the NPDES Primacy Work Group, which includes representatives of affected permittees. The Work Group was not convened in 2010.

The Work Group's members are listed at the DEC website at: http://www.dec.state.ak.us/water/npdes/work_group.htm, along with the 2005 Work Group Report.

Statutory, Regulatory, and Financial Issues

No statutory, regulatory, or financial impediments to implement the program exist; however, DEC will occasionally need to make revisions in response to changes to the federal program to keep Alaska's program current.

Transfer of Authority

EPA's October 2008 approval of the state's APDES program included transfer of permitting, compliance, and enforcement for specific dischargers in phases over a three-year period, rather than the five-year period envisioned in SB 110. The schedule to transfer authority is:

Phase I: At program approval - October 31, 2008

Domestic discharges, seafood industry, and timber handling

Phase II: One year from program approval - October 31, 2009

Storm Water Program, Pretreatment Program, and miscellaneous industrial discharges

Phase III: Two years from program approval - October 31, 2010

Mining industry

Phase IV: Three years from program approval - October 31, 2011

Oil and gas industry, cooling water intakes and discharges, and pesticides

As of October 31, 2010, DEC has assumed permitting, compliance, and enforcement authority for facilities in Phases I, II, and III. EPA retains authority for a facility until the facility transfers to the state in accordance with the transfer schedule. EPA may not issue a permit once jurisdiction for a facility has transferred to the state; however, pursuant to the Clean Water Act, EPA retains authority to review all DEC-drafted permits and to conduct inspections and pursue an enforcement action on any discharger in Alaska.

Phases I, II and III Program Implementation

DEC continues to fine tune permitting checklists and templates to streamline the permit issuance process and issue legally defensible permits; draft permits are posted on DEC's web page; and Tribes, the public, and EPA are notified when a permit is available for review, encouraging early input and fostering transparency in permitting decisions. Finally, all required APDES data are reported to EPA's national database, and DEC's web pages continue to be updated to better serve permittees and the public.

The APDES program is developing successfully, but implementation of the program is not without challenges. Many of the Phase I and II permits expired 5-10 years ago and were not reissued by EPA before transferring authority to DEC. These older, expired permits require more time and resources to develop than more recent permits. DEC is, however, making progress in reducing the backlog. The October 31, 2010 Phase III transfer of mine permits has proceeded more smoothly due to close collaboration with EPA prior to the transfer, as well as having experienced mine-permitting staff already in place. Early coordination with EPA resulted in timely receipt of Phase III facility files, which did not occur with the Phase I and II transfers.

EPA continues to review every stage (preliminary draft, public review draft, and proposed final permit) of every permit and has provided comments on most permits at each stage of the permitting process. Permit delays are being addressed through improved communication, along with a timely elevation process to resolve issues between DEC and EPA.

Permitting Activities

DEC is developing a three-year Permit Issuance Plan that identifies the schedule of permits proposed to be issued in 2011 through 2013. The updated plan will be posted soon on DEC's web page: <http://dec.alaska.gov/water/wwdp/index.htm>.

From January 1 through December 31, 2010, DEC issued 644 permit authorizations. Of that total, 637 were authorizations under general permits; four were Clean Water Act section 401 certifications of EPA-drafted NPDES permits, (two were Phase III permits for which authority transferred to DEC while the permits were on public notice and will be issued by DEC); and three were APDES individual permits. Twelve APDES permits are either under development or undergoing internal review prior to public notice, five are undergoing public review, and five have completed the public notice and review process and will be issued soon. DEC is also developing three Clean Water Act section 401 certifications of EPA-drafted NPDES permits.

DEC's efforts continue to be consistent with or exceed EPA's recent average of issuing 3-4 permits per year in Alaska with EPA issuing one permit in Alaska in 2010. DEC expects to greatly improve on that average during 2011 and beyond.

Compliance and Enforcement Activities

DEC conducted 140 inspections from January 1, 2010 through December 31, 2010. Facilities inspected included municipal domestic wastewater treatment plants, seafood processors, and construction sites. Staff also accompanied EPA on 6 joint inspections. DEC completed an inspection report and provided a response to the permittee within 43 days on average, more timely than EPA has traditionally done.

Based on the inspections, 22 Notices of Violations were issued and follow up enforcement actions, where appropriate, are pending.

DEC entered into a Compliance Order by Consent (COBC) with a seafood processor to settle permit violations. The COBC included a monetary penalty and a two year payment schedule.

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Program Capacity Development

DEC continued to implement several components of its capacity building plan to ensure adequate staffing and training to implement the APDES program. Although we continue to experience recruiting challenges, DEC successfully recruited the permit program manager position, two environmental engineers in the mining sector, three permit writers, and three compliance officers. The program is actively recruiting for four current vacancies.

In addition to taking over the permitting and compliance authority over the dischargers in Phases I, II, and III, staff will continue to receive classroom training and conduct joint inspections with EPA for the coming year.

Petition to the U.S. Ninth Circuit Court

On November 28, 2008, a petition (*Akiak et al v. US EPA*) challenging EPA's approval of Alaska's NPDES primacy application was filed with the U.S. Ninth Circuit Court. The petitioners included several Tribal councils, Cook Inlet Keeper, Alaska Center for the Environment, Alaska Community Action on Toxics, The Center for Biological Diversity, and The Center for Water Advocacy. The petitioners claimed that the state's program does not comply with 40 CFR §123.30 (judicial review of permits), because the state's 'loser pays' rule will deter potential litigants from challenging a permit decision in court. The petitioner also challenged the program based on the absence of administrative penalty authority and the loss of tribal consultation. DEC filed to intervene in the case in support of EPA's decision. On November 4, 2010, the U.S Ninth Circuit Court denied the petitioners' claims challenging EPA's approval to transfer the NPDES Program to Alaska. The petitioners have requested en banc review of the decision. EPA and DEC are currently preparing their responses to the petition.

DEC looks forward to continuing to implement the APDES program in Alaska to ensure protection of our valuable water resources through issuance of current, protective discharge permits, a robust inspection program, and timely and predictable enforcement actions to ensure compliance. We are prepared to answer any questions you may have about the APDES program.

Sincerely,



Lynn J. Tomich Kent
Director of Water

The Honorable Gary Stevens
The Honorable Mike Chenault

January 25, 2011

cc: Heather Brakes, Legislative Director, Office of the Governor
Kirsten Waid, Senate Secretary, Alaska State Legislature
Suzi Lowell, House Chief Clerk, Alaska State Legislature